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Nos. 88-1150,-1194,-1228

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF MISSOURI, *et al.*,
ICELEAN CLARK, *et al.*,
JACKSON COUNTY, MISSOURI, *et al.*,
Petitioners,

v.

KALIMA JENKINS, *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF RESPONDENTS JENKINS, *et al.* IN OPPOSITION TO CERTIORARI

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78 pp

Counter-Statement of Questions Presented

1. Whether the petitions are all jurisdictionally out of time.

2. Whether a federal district court, which has made detailed findings (upheld by the Court of Appeals) documenting long-maintained racial discrimination and segregation in the Kansas City, Missouri School District (KCMSD) and the extensive and continuing effects of that constitutional violation, should seek to fashion relief that will (insofar as possible) achieve the goal of providing students in the KCMSD with the same quality of integrated educational opportunities that the court determines would exist if the violation had not occurred.

3. Whether a federal district court, in such circumstances, should withhold relief that is adequate to

redress the educational harms occasioned by the constitutional violation -- in order to avoid the necessity of issuing a decree against state or local officials requiring them to raise funds (including by increasing tax levies) sufficient to implement a complete remedy for the violation.

4. Whether a federal district court, in such circumstances, lacks the power to effectuate a complete remedy for violations of the Fourteenth Amendment by directing that tax levies be increased in order to provide the revenue necessary to afford relief to the victims of unconstitutional discrimination and school segregation.

5. Whether a federal district court, in such circumstances, properly denied intervention to individuals and governmental entities whose petitions were not

submitted until after the tax levy measures which they sought to challenge had been ordered, despite the court's earlier announcement that it was likely to take action which would raise tax levies in order to assure implementation of an adequate remedy for serious and sustained Fourteenth Amendment violations.

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1988

Nos. 88-1150, -1194, -1228

STATE OF MISSOURI, et al.,

ICELEAN CLARK, et al.,

JACKSON COUNTY, MISSOURI, et al.,

Petitioners,

v.

KALIMA JENKINS, et al.

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to the United States Court of Appeals
for the Eighth Circuit

BRIEF OF RESPONDENTS JENKINS, et al. IN OPPOSITION TO CERTIORARI

Jurisdiction

None of the petitions to which this response is addressed was filed within 90 days of the issuance of the

final judgment below on August 19, 1988, as required by 28 U.S.C. § 2101(c) (1984),[1] nor was timely application for extension sought and granted by this Court or a Justice of the Court. Therefore, for the reasons articulated in the Brief in Opposition of Respondent Kansas City, Missouri School District (KCMSD) in these matters, in which the Jenkins respondents join, this Court lacks jurisdiction to grant the present petitions.[2] This fact alone is a sufficient basis for denying the writs.

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[1]Rule 20.4 of this Court, which tolls the 90-day period for filing a petition only if a timely petition for rehearing is filed, is consistent with Rules 35, 40 and 41, Fed. R. App. P., which establish an automatic stay of the issuance of a Court of Appeals' mandate during the pendency of a timely petition for rehearing but state explicitly that the pendency of a suggestion of rehearing in banc "shall not affect the finality of the judgment of the court of appeals or stay the issuance of the mandate" [Rule 35(c)].

[2]We have lodged with the Clerk of this Court ten copies of the Petitions for Rehearing En Banc filed below. Examination of these documents establishes that none of the present Petitioners requested rehearing; rather, all sought rehearing in banc. There were thus no "petitions for rehearing" subject to being denied as provided in the amended mandate of the Court of Appeals issued sua sponte on January 10, 1989 (see State Pet. at A-1).

Counter-Statement of the Case

The Jenkins respondents join in the KCMSD respondents' Counter-Statement.

REASONS FOR DENYING THE WRITS

Introduction

The instant Petitions concern aspects of orders issued by the United States District Court for the Western District of Missouri in the final, remedial stages of protracted, complex, school desegregation litigation involving the Kansas City, Missouri public schools. The district judge who issued these orders has presided over the action since its initiation in 1977. He has observed and heard hundreds of witnesses, including scores with educational or other academic, as well as practical, expertise. He has considered thousands of documentary

and other exhibits, has personally viewed the KCMSD school facilities, and has issued numerous opinions and orders containing specific, detailed and particularized findings of fact that provide the foundation for his legal determinations and orders.

The district court's major conclusions and actions have been severely criticized, at different times, by both sides in the litigation but, with only minor exceptions, panels of the Court of Appeals and a majority of the Court sitting en banc have sustained the trial judge's careful fashioning of a remedy appropriate to the nature and scope of the constitutional violations which he found.

First, following lengthy trial proceedings, the district judge applied this Court's ruling in Milliken v. Bradley,

418 U.S. 717 (1974)(Milliken I) and rejected the contentions of the Jenkins and KCMSD respondents here, that the proof justified an inter-district remedy involving pupil reassignments between and/or consolidation of the KCMSD and nearby suburban school systems. The court also held that the historic pre- and post-Brown constitutional violations by the KCMSD and the State of Missouri had never been redressed but that their effects had been exacerbated by delay and neglect of the defendants' affirmative constitutional obligations for decades. It directed that the continuing effects of these violations should be ameliorated through a remedial plan involving voluntary inter-district assignments, creation of integrated magnet schools in the KCMSD, improvement of the KCMSD's capital plant and of its educational programs to correct

deficiencies attributable to the long period of segregated operation, and implementation of special programs to address educational deficiencies created by that segregation, see Milliken v. Bradley, 433 U.S. 267 (1977)(Milliken II). With the exception of some alterations in the allocation of remedial costs between the KCMSD and the State of Missouri, all of these determinations were approved by the Court of Appeals, and this Court declined to review the denial of mandatory inter-district relief. Jenkins v. Missouri, 593 F. Supp. 1485 (W.D. Mo. 1984), 639 F. Supp. 19 (W.D. Mo. 1985), modified in part and aff'd, 807 F.2d 657 (8th Cir. 1986)(en banc), cert. denied, 108 S. Ct. 70 (1987).

Thereafter, the district court continued closely to supervise the refinement and implementation of the

remedy[3] for the constitutional violations which it found, proceeding in step-by-step fashion.[4] It approved and rejected remedial components suggested by all parties, including the State of Missouri and the Jenkins and KCMSD respondents.[5] It has sought to achieve a fair

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[3]E.g., State Pet. App. [hereinafter Pet. App.] 104a, 106a (approving continuation of two programs for 1987-88 to "give the KCMSD another year to meet the projected enrollments"); 639 F. Supp. at 46, Pet. App. 129a (requiring KCMSD to submit a detailed plan for improving public information about its desegregation plan in light of inadequate results after prior order allocating funds for this purpose); 639 F. Supp. at 50-51, Pet. App. 137a-138a (ordering further reports on implementation of educational programs under decree).

[4]See, e.g., Pet. App. 77a (approving capital program only for projects scheduled to be completed by fall of 1990); id. at 79a (approving budget for construction project management team for three years only); id. at 191a (approving only initial capital improvement plan and postponing consideration of additional measures); 639 F. Supp. at 45, Pet. App. 199a (suspension of tax rollback for one year only to "provide the KCMSD with an opportunity to present a tax levy proposal to its patrons at the next regularly scheduled school election").

[5]See, e.g., 639 F. Supp. at 32-33, Pet. App. 173a (ordering implementation of State's Early Childhood program); Pet. App. 65a (rejecting KCMSD's and Jenkins' suggested regulations for tax collection); id. at 95a (declining to order central coordination of school-based programs sought by KCMSD); id. at 118a-19a (requiring KCMSD to bear cost of renovating building to house temporary performing arts magnet); 639 F. Supp. at 49, Pet. App.
(continued...)

and equitable allocation of the costs of constitutional compliance between the two joint tortfeasors, the State of Missouri and the KCMSD.[6] The parties have vigorously contested the litigation at the remedial stage; the judgment of the Court of Appeals of which Petitioners seek review resolved consolidated appeals from some thirteen separate orders issued by the trial court.[7] This time, the principal appellants were the State of Missouri and state officials. Again, however,

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[5](...continued)
135a (rejecting KCMSD's requested expansion of before- and after-school programs).

[6]E.g., Pet. App. 79a (requiring KCMSD to pay 50%, rather than 25% of capital construction costs because "the KCMSD will continue to benefit from the[new facilities construction] long after the hopeful success of the desegregation plan has been realized"); id. at 107a (adjusting budget to account for savings in expenditures at other schools as new magnets open); id. at 109a (requiring KCMSD to bear ongoing maintenance costs for facilities constructed or improved under decree).

[7]Jenkins v. Missouri, 855 F.2d 1295, 1299 n.2 (8th Cir. 1988), Pet. App. 4a n.2.

with minor modifications and reversal only with respect to one separable aspect concerning funding,[8] the Court of Appeals approved the trial judge's careful supervision of this action.

It is against this background of painstaking attention by a district court with intimate familiarity with the particularities of the case, and whose actions have been almost wholly sustained on two occasions by the Court of Appeals, that this Court must assess the necessity and desirability of reviewing the judgment below.

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[8]The Court of Appeals sustained the district court's order raising the property tax millage in the KCMSD because "the property tax is the established source of revenue for Missouri school districts" and the order was the functional equivalent of "set[ting] aside restrictions or limitations imposed by state law that impede the disestablishment of a dual school system" (855 F.2d at 1315, Pet. App. 39a-40a). It reversed that portion of the court's orders that imposed an income tax surcharge on individuals working within the KCMSD because "the income tax surcharge restructures the State's scheme of school financing and creates an entirely new form of taxing authority" (855 F.2d at 1315, Pet. App. 40a).

Petitioners raise only a few issues.[9] Despite the provocative language of their filings, none of the questions they seek to present warrants the plenary attention of this Court because, as we show below, the lower courts have faithfully and unexceptionably applied well established legal principles and followed the decisions of this Court.

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[9]Petitioners in Nos. 88-1194 and 88-1228 sought intervention in this litigation in the district court, which was denied on the grounds that their requests were untimely; that denial was affirmed by the court below. The only question properly presented by these arties, therefore, is the correctness of the ruling affirming the denial of intervention.

Petitioners in No. 88-1150 do not contest either their own liability or the general remedial approach of the district court (improvements of KCMSD's capital facilities and educational programs together with the creation of magnet schools to bring about desegregation through voluntary means), an approach that they supported in the trial court, see infra note 12. Instead, they charge, first, that the district court has shaped the particulars of this remedial approach to achieve goals other than the effective dismantling of the long-maintained dual system of schools in the KCMSD. Second, they assert that the district court was without power to require the KCMSD to provide a portion of the resources necessary to implement the remedy through an increase in its property tax levy (a requirement which the court imposed only after both the KCMSD electorate and the State legislature had refused or failed to create a reliable funding mechanism for this purpose).

I

This Case Does Not Merit Review Because The Remedy Ordered By The District Court Is Appropriately Designed To Redress The Proven Constitutional Violations And Their Effects, And It Does Not Exceed The Scope Of The Trial Court's Broad Equitable Power To Afford Complete Relief To The Victims of Unconstitutional Segregation

This is a case in which the extensive and continuing harmful effects of the long-sustained constitutional violations committed by the State of Missouri and the KCMSD were identified with precision and detail in exhaustive proceedings before the district court. On that record, the trial court was charged, in fashioning a remedy, with the obligation of "restor[ing] the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct."[10] In the

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[10]Milliken II, 433 U.S. at 280.

orders affirmed below, in those previously reviewed by the Court of Appeals, and through its exercise of continuing jurisdiction during the transition from a dual school system, the district court has sought to provide a complete remedy that will be practicable, workable, and successful.[11]

Petitioners contest neither liability nor the broad outlines of the relief ordered by the trial court.[12]

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[11]The trial court described its responsibility and authority as follows:

> . . . [T]he goal of a desegregation decree is clear. The goal is the elimination of all vestiges of state imposed segregation. In achieving this goal, the district court may use its broad equitable powers, recognizing that these powers do have limits. Those limits include the nature and scope of the constitutional violation, the interests of state and local authorities in managing their own affairs consistent with the constitution, and insuring that the remedy is designed to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.

(639 F. Supp. at 23, Pet. App. 153a.) See Hutto v. Finney, 437 U.S. 678, 688 & n.12 (1978).

[12]See, e.g., 593 F. Supp. at 24, Pet. App. 155a ("No party to (continued...)

Implicitly recognizing the difficulties inherent in asking this Court to entertain questions that are fact-bound and unique to the circumstances of an individual case, Petitioners have wrenched language in the district court's opinions out of context in an effort to describe legal questions more susceptible of being characterized as worthy of this Court's discretionary review. A fair reading of the district court's orders demonstrates,

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[12](...continued)
this case has suggested that this plan should not contain components designed to improve educational achievement. In fact, it is 'appropriate to include a number of properly targeted educational programs in a desegregation plan' (State Plan at 5)"); 593 F. Supp. at 26, Pet. App. 158a ("both the State of Missouri and the KCMSD endorse achieving AAA status, reducing class size at the elementary and secondary level, summer school, full day kindergarten, before and after school tutoring and early childhood development programs"); 593 F. Supp. at 40, Pet. App. 189a ("The State (State Plan p. 111) proposes a $20,000,000 facilities improvement program with the state making a one time contribution not to exceed $10,000,000. . . . The State does not dispute that there are serious structural and environmental problems throughout the facilities utilized by the KCMSD"); 855 F.2d at 1299, Pet. App. 5a ("In this case the district court dealt with undisputed constitutional violations and its series of orders were necessary to remedy the lingering results of these violations, since local and state authorities had defaulted in their duty to correct them.").

however, that the legal issues relating to the goals of the remedy that are posited by Petitioners simply do not arise in this matter.

A. The district court did not require a magnet plan "to attract additional non-minority students" for the purpose of transforming the KCMSD into "a district . . . with some particular number of white and black students"

The State's Petition attacks the scope of the magnet school program to be established in the KCMSD under the district court's orders:

> No other court has required a district to turn most of its schools into magnet schools, and no other court has imposed a duty to attract more students of a designated race. . . . [T]he right at issue . . . is not [a right] to be enrolled in a district or school with some particular number of white and black students.

(Pet. at 15.) The State simply ignores the trial court's

lucid elaboration of the basis for its magnet school requirements.

In its initial remedial order the court recognized its obligation "to further explore any reasonable potential for achieving further desegregation" of the KCMSD schools (639 F. Supp. at 38, Pet. App. 184a). It declined to order mandatory reassignments within the KCMSD

> [u]nless and until th[e study suggested by the State of Missouri] or other studies show that further mandatory student reassignment can achieve additional desegregation without destabilizing the desegregation which presently exists.

(Id.)[13] On the other hand, the district court had heard evidence from a number of expert witnesses that "[m]agnet schools can be utilized to assist the State of

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[13]Cf. Green v. County School Bd. of New Kent County, 391 U.S. 430, 441 (1968)(voluntary enrollment option may have a place in a desegregation plan in the absence of alternatives "promising speedier and more effective conversion to a unitary, nonracial school system").

Missouri and the KCMSD in expanding desegregative educational experiences for its students" (639 F. Supp. at 34, Pet. App. 176a), and it required submission of a plan to utilize this voluntary desegregation tool (639 F. Supp. at 34-35, Pet. App. 177a).[14]

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[14]The concept of a magnet school is to offer a different, improved or unique curriculum or service (such as before- or after-school day care) that will attract voluntary attendance by students of all races. This Court has approved of magnet schools as a desegregation tool on a number of occasions. See, e.g., Milliken II, 433 U.S. at 272; Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 488 (1979), and the courts of appeals and district courts have consistently approved desegregation plans incorporating magnet schools as an 1alternative to mandatory and involuntary reassignments of students. See Diaz v. San Jose Unified School Dist., 861 F.2d 591, 596 (9th Cir. 1988); United States v. Yonkers Bd. of Educ., 837 F.2d 1181; 1238 (2d Cir. 1987), cert. denied, 108 S. Ct. 2821 (1988); Liddell v. Missouri, 731 F.2d 1294, 1310 (8th Cir.), cert. denied, 469 U.S. 816 (1984); Davis v. East Baton Rouge Parish School Bd., 721 F.2d 1425, 1440 (5th Cir. 1983); Arthur v. Nyquist, 712 F.2d 809, 811-13 (2d Cir. 1983), cert. denied, 464 U.S. 892 (1983); Berry v. School Dist. of Benton Harbor, 698 F.2d 813 (6th Cir.), cert. denied, 464 U.S. 892 (1983); United States v. Texas Educ. Agency, 679 F.2d 1104 (5th Cir. 1982); Morgan v. Kerrigan, 530 F.2d 401, 428 (1st Cir.), cert. denied, 426 U.S. 935 (1976), subsequent proceeding sub nom. Morgan v. McDonough, 689 F.2d 265, 276 n.18 (1st Cir. 1982); Hart v. Community School Bd., 512 F.2d 37, 54-55 (2d Cir. 1975).

The Congress and the President have also expressed unambiguous support for magnet programs as an effective and unintrusive remedy for school segregation. See S. Rep. No. 100-

(continued...)

The Court subsequently approved implementation of three magnet schools or clusters in the 1986-87 school year to "expan[d] the desegregative educational experience for KCMSD students" and to assess the potential success of this desegregation device:

> The magnet plan must be geared toward both remedial and desegregative goals and should maximize achievement of desegregation with a minimum amount of resources. The magnet program should provide long term stability in terms of future financing as well as incorporate a carefully designed marketing program based upon a careful analysis of the plans' impact upon other components of the desegregation plan. Thus, future development of a magnet school program

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[14](...continued)
222, 100th Cong., 1st Sess. 48 (1987)("Research has shown that magnet schools are the most successful means for promoting racial desegregation"), reprinted in 3 1988 U.S. Code Cong. & Adm. News 149 (June, 1988); Remarks on Signing the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, 24 Weekly Comp. of Pres. Doc. 540 (Apr. 28, 1988)(President Reagan "pleased to note that the bill reauthorizes the magnet school program and expands parental choice"); Hawkins-Stafford Amendments of 1988, Pub. L. No. 100-297, § 3993, 102 Stat. 231 (1988)(to be codified at 20 U.S.C. § 3023); Education for Economic Security Act, Pub. L. No. 98-670, § 703, 98 Stat. 1267, 1299 (1984).

> need not duplicate this initial phase of the magnet school effort.

(639 F. Supp. at 53, 55, Pet. App. 145a, 149a.) Based upon initial experience with these magnets and upon evidence adduced at additional hearings, the court ultimately determined to approve KCMSD's plan to establish a substantial number of magnet schools.

However, the court's Order makes it clear that the fundamental basis for "turn[ing] most of [KCMSD's] schools into magnet schools," as the State puts it, is to avoid the inequity which would occur if black students -- the victims of the State's and KCMSD's protracted unconstitutional conduct -- were restricted in their opportunities to benefit from the improved or unique educational experiences to be offered in magnet schools:

> The plan magnetizes such a large number of schools that every high school and middle school student will attend a magnet school. At the

elementary level, there would be a sufficient number of magnets to permit every student desiring to attend a magnet school to do so. The Court is opposed to magnetizing only a limited number of schools in a district . . . . In each [magnet] school there is a limitation as to the number of students who may be enrolled. Thus, for each non-minority student who enrolls in the magnet school a minority student, who has been the victim of past discrimination, is denied admittance. While these plans may achieve a better racial mix in those few schools, the victims of racial segregation are denied the educational opportunity available to only those students enrolled in the few magnet schools. This results in a school system of two-tiers as it relates to the quality of education. This inequity is avoided by the KCMSD magnet school plan.

(Pet. App. 122a.)[15]

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[15]As the Court of Appeals noted:

The State in its filings with the district court cautioned about creation of a two-tiered system of schools in which "existing schools are, or are perceived to be, markedly inferior." Response of State to KCMSD motion for approval of 1986-87 magnet programs, p. 12. The State's expert witness, Dr. Doyle, echoed this concern and suggested that one way to avoid the problem was to convert an entire school system to magnet schools. Tr. 376, 381-82, June 5, 1986. Another State's witness, Dr. Cooper, also agreed on cross-examination that the comprehensiveness of the plan was a step in the right

(continued...)

In the following paragraph of its Order, the district court did comment, as the State emphasizes, that

> Most importantly, the Court believes that the proposed magnet plan is so attractive that it would draw non-minority students from the private schools who have abandoned or avoided the KCMSD, and draw in additional non-minority students from the suburbs.

(Pet. App. 123a). However, that comment is quoted entirely out of context by the State.[16] It does not refer

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[15](...continued)
direction. Tr. 890, Sept. 18, 1986. The district court's finding regarding the need for the number of magnet schools authorized by the plan is amply supported by the State's own evidence.

(855 F.2d at 1304, Pet. App. 15a.) Compare United States v. Pittman, 808 F.2d 385, 393 (5th Cir. 1987)(Higginbotham, J., concurring)(warning that selective magnet schools exclude a large number of "average" black students); Davis v. East Baton Rouge Parish School Bd., 721 F.2d at 1437 n.10 (magnet plan could create new dual system of white magnets and black regular schools).

[16]The complex analyses which undergird the district court's remedial orders in this case cannot be reduced to the two or three phrases that are taken out of context and repeatedly intoned throughout the Petition without seriously distorting the trial court's reasoning and actions. Unfortunately, the Petition contains numerous erroneous and misleading characterizations of the holdings below.

(continued...)

to the reasons for the district court's approval of the number of magnet schools provided by the plan. Instead, it is the concluding sentence of an entirely new paragraph of the Order in which the district court found that the particular magnet themes and emphases suggested in the KCMSD plan were likely to succeed in attracting a desegregated enrollment.[17] Thus, the State's

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[16](...continued)

For one example, the State charges that "the court [of appeals] means to . . . apply a far-reaching theory of 'but-for' causation--one that would make the State liable for an effect of desegregation, rather than for effects of segregation itself" (Pet. at 17-18). In fact, in the portion of its opinion to which the Petition makes reference, the Court of Appeals sustained the district court's orders on the basis of the trial judge's conclusion that the discriminatory and segregative practices of the KCMSD had caused whites to leave or avoid the system's public schools. See 855 F.2d at 1302, Pet. App. 11a-12a. It was the State of Missouri itself which raised the question of so-called "white flight from desegregation," and what the State now terms a "far-reaching theory of 'but-for' causation" is merely the Court of Appeals' rejection of the State's contention that there was an intervening, independent cause of white enrollment loss in the KCMSD that excused the joint tortfeasors of all responsibility to correct the effects of their prior constitutional violations. See 855 F.2d at 1303, Pet. App. 13a.

[17]The entire paragraph is as follows:

(continued...)

tendentious argument that a majority-black school system is not unconstitutional (Pet. 15-19) is simply beside the point.[18] The basis for the trial court's approval of

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[17](...continued)
The Court also finds that the proposed magnet plan would generate voluntary student transfers resulting in greater desegregation in the district schools. The suggested magnet themes include those which rated high in the Court ordered surveys and themes that have been successful in other cities. Therefore, the plan would provide both minority and non-minority district students with many incentives to leave their neighborhoods and enroll in the magnet schools offering the distinctive themes of interest to them. Most importantly, the Court believes that the proposed magnet plan is so attractive that it would draw non-minority students from the private schools who have abandoned or avoided the KCMSD, and draw in additional non-minority students from the suburbs.

[18]In addition to mischaracterizing the lower courts' determinations, the State also attacks a number of the trial court's factual findings. Both the "two-Court rule," see, e.g., Burger v. Kemp, 483 U.S. ___, ___, 97 L. Ed. 2d 638, 651 (1987); Goodman v. Lukens Steel Co., 482 U.S. ___, ___, 96 L. Ed. 2d 572, 584 (1987), and this Court's traditional reliance upon the district courts in school desegregation cases, see Columbus Bd. of Educ. v. Penick, 443 U.S. at 457 n.6, 464, id. at 468 (Burger, C.J., concurring in the judgment); id. at 469-71, 475-76 (Stewart, J. & Burger, C.J., concurring in the result), counsel against disturbing these findings.

In any event, the State's contentions are not convincing. The State charges the district court with making inconsistent findings in its August 25, 1986 and June 5, 1984 Orders (see Pet. at 17 n.21). In its earlier (1984) Order, while adjudicating the liability -- not the (continued...)

KCMSD's magnet school submission was its conclusion

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[18](...continued)
remedy -- portion of the case (see 593 F. Supp. at 1505, Pet. App. 240a), the district court had discussed "[p]art of plaintiffs' evidence of white flight to the suburbs consist[ing] of charts displaying the transfer of student records from various KCMSD high schools to surrounding districts over a 15-year period from 1958 to 1973." The court rejected plaintiffs' contentions that the evidence supported imposition of inter-district liability because "there is no evidence that the [suburban districts] enticed these families to move" and "the numbers involved are too insignificant to have had a segregative impact on the KCMSD or the [suburban districts]. White flight is simply not a constitutional violation by any [suburban district]." (June 5, 1984 Order, at 38-39.)

Then, in 1986 the trial court observed that it had

> found that segregated schools, a constitutional violation, has led to white flight from the KCMSD to suburban districts, large number of students leaving the schools of Kansas City and attending private schools and that it has caused a systemwide reduction in student achievement in the schools of KCMSD.

(August 25, 1986 Order, at 1-2.) These findings are not inconsistent, as the State suggests. In the 1984 Order, the district court did not find that there was no "white flight." Rather, it refused to impose inter-district liability on the basis of "white flight" because the suburban districts were overwhelmingly white in racial composition irrespective of the movement of white pupils who left the KCMSD (see, e.g., June 5, 1984 Order at 45, 49, 51, 55, 62, 67-70, 74-75, 79, 84-86, 91), and because the KCMSD schools remained highly segregated by virtue of that district's discriminatory practices during the 1958-73 time period, irrespective of its racial composition (see, e.g., Pet. App. 211a-215a; Pet. App. 209a-210a [discussing Davis v. East Baton Rouge Parish School Bd., 721 F.2d 1425 (5th Cir. 1983)(rejecting similar argument that demographic change was responsible for school segregation)]).

that this magnet plan was both most likely to be successful in achieving actual desegregation and also most equitable for black students in the district, not any sort of desire to attain a specific racial balance in the district's schools.[19]

B. The district court's goal of achieving comparability between KCMSD's facilities and programs with the average of those of surrounding systems was a reasonable starting point in the formulation of a remedy to eliminate the effects of the proven constitutional violations.

The State attacks the remedial orders in this action that require capital improvements within the KCMSD,

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[19]Indeed, as the State itself points out (Pet. at 18 n.22), neither the district court nor the Court of Appeals has imposed any requirement that some minimum number of white students from outside the KCMSD boundaries enroll in the magnet schools. The lower courts' failure to do so fatally undercuts the State's contention that the magnet school plan was approved for the purpose of satisfying some judicially created "duty to attract additional non-minority students to a school district" so as to change the KCMSD into a district "with some particular number of white and black students" (Pet. at 15).

contending that the district court has read into the "equal protection clause [a] require[ment] that a school district . . . once-segregated [must be made] comparable to neighboring districts" (Pet. at 13).[20] This contention is

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[20]The State has failed to raise this issue in a timely fashion before this Court. On June 14, 1985, the district court directed that KCMSD make capital improvements more extensive than those which the State of Missouri had argued were appropriate in light of the violation, specifically indicating that

> [a]fter the submission of the $37,000,000 improvement plan, KCMSD shall then review other capital improvements needed in order to bring its facilities to a point comparable with the facilities in neighboring suburban school districts.

(639 F. Supp. at 41, Pet. App. 191a.) The State appealed from this capital improvements order, making the same arguments it now raises in its Petition (compare, e.g., 807 F.2d at 685 with Pet. at 7 and 639 F. Supp. at 40-41, Pet. App. 189a-190a). The Eighth Circuit, en banc, affirmed the scope of the plan while modifying the allocation of financial responsibility between the KCMSD and the State, 807 F.2d at 685-86. The State chose not to seek review of that ruling by this Court.

Since that time, additional renovations, improvements and construction have been ordered, undertaken and/or completed, subject to the equal allocation of costs directed by the Court of Appeals in 1986. The additional, avoidable and wholly unexpected financial burden which would be shifted from the State to some other party -- in all likelihood to the KCMSD and its taxpayers, including the black parents and children who are the victims of the long-continued constitutional violations in this case -- if the capital improvements orders were now overturned, provides a compelling (continued...)

similar to the argument advanced by the defendants in Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 23-25 (1971), that because the student assignment plan there was drawn with an awareness of the overall proportion of minority pupils in the system, it embodied a substantive right to a particular racial balance. In Swann, this Court rejected the argument, because the system-wide proportion had been employed as a starting point to help determine whether the plan would "achieve the greatest possible degree of desegregation, taking into account the practicalities of the situation," Davis v. Board of School Commissioners, 402 U.S. 33, 37 (1971).[21] Here, it is similarly clear that

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[20](...continued)
reason why the State's contentions that could have been raised in 1986 became the law of the case at that time and ought not be entertained by this Court now.

[21]See also, e.g., Hutto v. Finney, 437 U.S. at 685-86 & n.8.

the standard of comparability to suburban facilities was employed by the district court as an operational guide, not a substantive goal.

When the district court concluded the liability phase of this case and turned its attention to the formulation of an adequate remedy, it was confronted with a school system in which the adverse effects of racial discrimination and segregation were still very much in evidence: "a system wide reduction in student achievement" (639 F. Supp. at 24, Pet. App. 155a); a school district which, alone among systems in the Kansas City metropolitan area, lacked the state "AAA rating [that] is a designation which communicates to the public that a school system quantitatively and qualitatively has the resources necessary to provide minimum basic education to its students" (639 F. Supp. at 26, Pet. App.

159a); an "educational process [that] has been further 'bogged down' in the KCMSD by a history of segregated education" (639 F. Supp. at 28, Pet. App. 164a);[22] and school facilities whose "current condition . . . adversely affects the learning environment . . . [because of] safety and health hazards, educational environment impairments, functional impairments, and appearance impairments" (639 F. Supp. at 39, Pet. App. 187a).[23] Accordingly, the court sought to devise a remedy that would eliminate the continuing impact of the violation.

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[22]The court commented that while "[a]ll, regardless of race or class or economic status, are entitled to a fair chance and to the tools for developing their individual powers of mind and spirit to the utmost, . . . [s]egregation in the KCMSD has resulted in this promise going unkept" (639 F. Supp. at 24; Pet. App. 154a).

[23]In a later order, the district court characterized the KCMSD school plant as having "literally rotted," 672 F.2d at 211, Pet. App. 86a.

For example, the court was persuaded by "[t]he testimony of all the educational experts [for all parties that] . . . the schools in KCMSD, when provided with adequate resources, sufficient staff development, and proper teaching methods, can attain educational achievement results more in keeping with the national norms" (639 F. Supp. at 24, Pet. App. 156a). With substantial agreement from the State of Missouri,[24] the court therefore required implementation of a wide variety of innovative, supportive, and training programs to restore the educational climate within the KCMSD. To effectuate these aspects of the remedy, the court

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[24]See, e.g., 639 F. Supp. at 25, Pet. App. 156a ("both the State of Missouri and the KCMSD have proposed program components designed to increase student achievement at the elementary and secondary levels"); 639 F. Supp. at 26, Pet. App. 158a ("both the State of Missouri and the KCMSD endorse achieving AAA status, reducing class size at the elementary and secondary level, summer school, full day kindergarten, before and after school tutoring and early childhood development programs").

determined, on the basis of overwhelming evidence placed before it, that substantial improvement of KCMSD's school buildings would be necessary:

> The improvement of school facilities is an important factor in the overall success of this desegregation plan. Specifically, a school facility which presents safety and health hazards to its students and faculty serves both as an obstacle to education as well as to maintaining and attracting non-minority enrollment. Further, conditions which impede the creation of a good learning climate, such as heating deficiencies and leaking roofs, reduce the effectiveness of the quality education components contained in this plan.

(639 F. Supp. at 40, Pet. App. 188a.)[25] The district court has continued, throughout the subsequent course of this litigation, to focus on capital needs that are directly related to eliminating the continuing effects of the violations and to the educational components of the plan (e.g., 672 F. Supp. at 404, Pet. App. 70a-71a).

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[25] See also 639 F. Supp. at 41, Pet. App. 190a.

As we have previously noted, the trial court determined to institute magnet school options and to solicit the participation of suburban school districts in a voluntary inter-district transfer program to expand the possibilities for achieving further desegregation of the KCMSD (639 F. Supp. at 34-35, 38-39, Pet. App. 176a-177a, 185a-187a). The court found that the successful implementation of integrated magnet schools demanded adequate plant, facilities and equipment.[26] Thus, in its initial remedial decree, the district court ordered KCMSD to submit a first-year budget for its existing magnet schools, to include "budget items which are directly related to enhancing the full desegregative drawing power of these schools" (639 F. Supp. at 34,

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[26]As the district court stated, "[t]he magnet school plan is crucial to the success of the Court's total desegregation plan and the KCMSD cannot effectively implement the magnet programs without special facilities" (672 F. Supp. at 406, Pet. App. 75a).

Pet. App. 177a), and the court thereafter approved both operating and capital expenditures for the magnets (639 F. Supp. at 53, 54-55, Pet. App. 144a, 146a-148a). In the 1987 Order on which the State focuses, the trial court rejected the State's capital program submissions in part because "the State failed to estimate the cost necessary to provide magnet facilities needed to implement the long-range magnet school plan approved by the Court on November 12, 1986" (672 F. Supp. at 404, Pet. App. 71a).

Because the capital improvements are tied to effective implementation of the magnet schools and the educational components of the desegregation plan, the Petition is misleading in intimating that everything which the district court ordered in September, 1987 "was

expressly designed to make KCMSD schools comparable to suburban schools" (Pet. at 7-8).

In many of the areas given remedial attention, performance standards that would assure that the effects of the violation would be eliminated were readily ascertainable. For instance, the Missouri State Department of Elementary and Secondary Education awards ratings (such as the AAA rating) to school districts on the basis of annual evaluations and had established and documented KCMSD's deficiencies and needs (see 639 F. Supp. at 26-28, Pet. App. 158a-163a). With respect to reductions in class size, the court accepted goals suggested by the KCMSD that were less stringent and less costly than the recommendations made

by the Missouri State Board of Education (see 639 F. Supp. at 28-30, Pet. App. 163a-168a).

As to capital improvements, the district court articulated a set of standards that were closely related both to the violations it had found and the other remedial components it was ordering. First, the court required "eliminating safety and health hazards" and "correcting those conditions existing in the KCMSD school facilities which impede the level of comfort needed for the creation of a good learning climate" (639 F. Supp. at 41, Pet. App. 191a). These goals were directly responsive to the discrimination in the KCMSD under the dual system.[27] Second, the court recognized

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[27]The State does not dispute the historically inferior quality of black schools under the dual system in the KCMSD, which is in any event established on this record. See, e.g., Tr. 818-24, 1,743-46, 16,835. Nor did the State demonstrate -- and the district court did not make any finding -- that the inadequacies attributable to the dual system had been redressed prior to the time that a deferred (continued...)

that the voluntary enrollment of white students in KCMSD magnet schools would not be possible if those schools continued to be perceived as inferior to

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[27](...continued)
maintenance program at all schools was made necessary by voter refusal to approve bond issues for capital improvements, 639 F. Supp. at 39, Pet. App. 187a. Thus, the capital improvements ordered by the trial court in part correct pre-Brown inequalities that were perpetuated and exacerbated within the KCMSD by the district's and the State's failure to meet their affirmative obligations to eliminate the vestiges of enforced segregation. See Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. at 18 ("the first remedial responsibility of school authorities is to eliminate invidious racial distinctions. . . . Similar corrective action must be taken with regard to the maintenance of buildings and the distribution of equipment").

Capital improvements have been routinely ordered as appropriate components of remedial decrees in desegregation cases. See, e.g., United States v. Yonkers Bd. of Educ., 856 F.2d 7 (2d Cir. 1988); Liddell v. Board of Educ., 801 F.2d 278 (8th Cir. 1986); Plaquemines Parish School Bd. v. United States, 415 F.2d 817, 831 (5th Cir. 1969); United States v. Jefferson County Bd. of Educ., 380 F.2d 385, 393-94 (5th Cir.)(en banc), cert. denied sub nom. Caddo Parish School Bd. v. United States, 389 U.S. 840 (1967); Morgan v. Nucci, 617 F. Supp. 1316, 1318 (D. Mass. 1985), appeal dismissed, 831 F.2d 313 (1st Cir. 1988); Hoots v. Pennsylvania, 539 F. Supp. 335, 338 (W.D. Pa. 1982), aff'd, 703 F.2d 722 (3d Cir. 1983); Tasby v. Estes, 412 F. Supp. 1192, 1219 (N.D. Tex. 1976), remanded on other grounds, 572 F.2d 1010 (5th Cir. 1978); Singleton v. Anson County Bd. of Educ., 283 F. Supp. 895, 903 (W.D.N.C. 1968); Redman v. Terrebone Parish School Bd., 293 F. Supp. 376, 379 (E.D. La. 1967).

alternative educational opportunities available to these students.[28] For this reason, the court required that renovation and construction plans also take into account "improving [KCMSD's] facilities to make them visually attractive" and "comparable with the facilities in neighboring suburban school districts" (639 F. Supp. at 41, Pet. App. 191a). This goal was not, however, devised by the trial court to obliterate "[d]ifferences in local school funding" or to transform "a 'system of school financing [which] results in unequal expenditures between children who happen to reside in different districts . . .'" (Pet. at 19-20, quoting San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 54-55 (1973)). Rather, it represents the starting point in designing a remedy for

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[28]Cf. 639 F. Supp. at 26, Pet. App. 159a (KCMSD only district in metropolitan area not rated "AAA").

the constitutional violations that is adequate and workable:

> The long term goal of this Court's remedial order is to make available to all KCMSD students educational opportunities equal to or greater than those presently available in the average Kansas City, Missouri metropolitan suburban school district. In achieving this goal the victims of unconstitutional segregation will be restored to the position they would have occupied absent such conduct, while establishing an environment designed to maintain and attract non-minority enrollment.

(639 F. Supp. at 54, Pet. App. 145a-146a [emphasis in original deleted and emphasis added].) Simply put, the standard of general comparability to the average school system in the geographic area was utilized as a practical mechanism for identifying the educational opportunities and facilities that were denied to KCMSD's black students as a result of the practices of racial segregation and discrimination,[29] and for assuring the likely success

[29]"[T]he Court has the responsibility of providing the victims of (continued...)

of the magnet options.[30]

Petitioners strain to fashion some legal issue worthy of review by claiming that there was no "state action" which justifies the capital improvements orders because, as the State argued unsuccessfully to the trial court, "'the present condition of the district school facilities is not traceable to unlawful segregation but is due to a lack of maintenance by the KCMSD'" (Pet. at 7) and, it asserts, "[t]here is no conceivable way that a KCMSD resident, entering a voting booth to support or oppose a tax

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[29](...continued)
unlawful segregation with the educational facilities that they have been unconstitutionally denied. Therefore, a long-range capital improvement plan aimed at eliminating the substandard conditions present in KCMSD schools is properly a desegregation expense and is crucial to the overall success of the desegregation plan" (672 F. Supp. at 403, Pet. App. 69a).

[30]"In conclusion, if the KCMSD schools underwent the limited renovation proposed by the State, the schools would continue to be unattractive and substandard, and would certainly serve as a deterrent to parents considering enrolling their children in KCMSD schools" (672 F. Supp. at 405, Pet. App. 72a).

increase, can 'fairly be said to be a state actor'" (Pet. at 20).

These contentions do not justify granting the writ. In the first place, as the Court of Appeals held,

> this argument advanced by the State attacks an aspect of the court's findings that was merely an alternative basis for its conclusion. . . . Even absent the findings that the State contributed to causing the decay, the capital improvements would still be required both to improve the education available to the victims of segregation as well as to attract whites to the schools.

(855 F.2d at 1305, Pet. App. 18a.) The issue fashioned by the State thus will not be reached even if review were granted.[31] Moreover, the trial court found that the

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[31]Similarly, the Petition refers to

> the court of appeals' attempt to match voting patterns with the existence of "segregation"--by pointing out that voting support fell off when the district enrollment became majority black (Pet. App. 18a n.7) . . . .

(Pet. at 20). But the Court of Appeals, in the footnote cited by Petitioners, explicitly noted that while "[t]he record tends to support these arguments . . . the district court did not base its findings of

(continued...)

racially discriminatory policies carried out in the KCMSD after Brown "contributed to, if not precipitated, an atmosphere which prevented the KCMSD from raising the necessary funds to maintain its schools" (Pet. App. 124a),[32] and the Court of Appeals affirmed (855 F.2d at 1305, Pet. App. 17a-18a). Review of findings concurred in by both courts below is inappropriate under the "two-court" rule, see supra note 18.[33]

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[31](...continued)
fact and conclusions of liability on this theory, [and] we need say no more." The judgments below therefore do not rest, in any part, upon the facts described in the footnote cited by Petitioners.

[32]Cf., e.g., Reitman v. Mulkey, 387 U.S. 369, 373, 376 (1967)(examination of voter initiative "in terms of its 'immediate objective,' its 'ultimate effect' and its 'historical context and the conditions existing prior to its enactment'" revealed that "intent . . . was to authorize private racial discriminations in the housing market . . . and to create a constitutional right to discriminate on racial grounds").

[33]If the State's arguments were to be considered on their merits, they are clearly lacking in substance. KCMSD's electorate is simply not a mass of individual private citizens when it exercises the power conferred upon it by Missouri school law to determine the level of capital expenditure in a district; its decisions in such matters are as much state action as the electoral initiatives involved
(continued...)

II

The District Court's Order Directing The Collection, For A Limited Period Of Time, Of Additional Property Tax Revenues Within The KCMSD Adequate To Support The District's Share Of The Remedial Costs Is An Appropriate Exercise Of Its Equitable Remedial Authority To Effectuate The Fourteenth Amendment To The Constitution

The discussion in the preceding section demonstrates that the measures ordered by the district court are necessary and appropriate to provide a complete remedy for the unconstitutional and discriminatory actions of KCMSD and Missouri officials, and that no issue justifying review by this Court with respect to the goals of those remedies is raised by Petitioners. There remain

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[33](...continued)
in Washington v. Seattle School District No. 1, 458 U.S. 457 (1982), Hunter v. Erickson, 393 U.S. 385 (1969), and Reitman v. Mulkey. The district court's orders were not directed to persons who acted as private parties, such as the "charitable and civic groups" which declined or were unable to assist KCMSD in raising funds for capital improvements (see August 25, 1986 Order at 3).

for consideration Petitioners' contentions that the trial judge so far departed from the appropriate exercise of his equitable authority in directing the collection of additional property taxes within the KCMSD as to warrant scrutiny by this Court. Contrary to Petitioners' plaintive assertions, we believe that the power of a federal district court -- in fashioning relief adequate to redress Fourteenth Amendment violations -- to require local officials to increase tax collection when all other means of assuring implementation of the remedy have been exhausted, is unquestionable; and that the appropriateness of its exercise in this instance is established by the decisions of this Court.

A. The authority of federal courts in school desegregation suits to require local tax levy and collection in order to effectuate relief necessary to vindicate Fourteenth Amendment rights was settled in Griffin and this case fits squarely under that ruling.

Preliminarily, we emphasize that this question is presented in the context of admitted, protracted, substantial violations of the Equal Protection Clause of the Fourteenth Amendment which the district court found to have caused substantial, continuing harm to the education of black children in the KCMSD; and in the context of that court's having determined what is the necessary and appropriate remedy to eliminate the continuing effects of the violations. It is totally wrong to say, as the State of Missouri does (Pet. at 27), that neither of the courts below "made any serious inquiry into whether the KCMSD might become unitary without a mandatory tax increase." The district court carefully

shaped the remedy to be responsive to the nature and scope of the violation and rejected the parties' submissions that it viewed as going beyond this parameter.[34] Its conclusion, which was affirmed by the court below, was that the remedies it was ordering were necessary to accomplish the operation of the KCMSD schools free from racial discrimination and its effects.[35]

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[34]See supra note 5 and accompanying text; Pet. App. 96a-97a (disapproving requested funding increase for test updates that would be required even in absence of desegregation plan).

[35]In contrast, the State of Missouri appears to argue that the district court should have curtailed the remedy -- in other words, rendered it less than fully adequate -- to avoid the possibility that if state law inhibitions on KCMSD's ability to raise funds were not modified by the state legislature (as they were not), the court might be required to order an increase in the tax levy. (See State Pet. at 27.) The suggestion carries deference to the point of submission and would inevitably reward recalcitrance.

The cases on which the State seeks to rely are inapposite. For example, in New York State Association for Retarded Children v. Carey, 631 F.2d 162, 165 (2d Cir. 1980), cited in State Pet. at 27 n.34, an alternative to requiring increased state funding -- "clos[ing] the institution" -- was available because that remedy would have relieved the plaintiffs from suffering the unconstitutional conditions of confinement, see id. at 166 n.1 (Kearse, J., concurring). See also Rhem v. Malcolm, 507 F.2d 333, 341 & n.19 (2d Cir. 1974)(closing (continued...)

Under these circumstances, the court's authority to impose additional property tax obligations within the KCMSD in order to secure effectuation of the remedy is, we suggest, unquestionable. In Griffin v. County School Board of Prince Edward County, 377 U.S. 218 (1964), the public schools of one county within a state had been closed to avoid the requirements of the

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[35](...continued)
institution had "crucial practical advantage . . . of not putting the judge in the difficult position of trying to enforce a direct order to the City to raise and allocate large sums of money" but in "a situation where the unconstitutionally-administered governmental function must be kept operating in any event . . . , a court might have no choice but to order an expensive, burdensome or administratively inconvenient remedy"); Reece v. Gragg, 650 F. Supp. 1297, 1307-11 (D. Kan. 1986)(setting jail population ceilings as condition for staying injunction against continued operation of facility pending submission and implementation of plan to correct unconstitutional conditions), cited in Clark Pet. at 22 n.6.

Such an approach is not feasible in a school desegregation action. Enjoining the operation of the KCMSD schools until the remedy were implemented would cause further harm to the victims of the constitutional violations. Enjoining all public schooling in the KCMSD suburbs, or throughout Missouri, until the plan were funded, would similarly penalize the victims of segregation as well as be a gross departure from equitable principles.

Fourteenth Amendment as interpreted by this Court in Brown, cutting off the opportunity for black pupils within the county to be educated. White pupils were assisted by county authorities to continue their schooling through a program of tuition grants for private school attendance and tax exemptions and credits. This Court held that the scheme violated the Fourteenth Amendment.

In its opinion, this Court explicitly outlined "the kind of decree necessary and appropriate to put an end to the racial discrimination practiced against the[black children] under authority of the Virginia laws." Id. at 232. The district court had enjoined payment of the tuition grants or allowance of the tax exemptions so long as the public schools remained shut, and this Court had "no doubt of the power of the court to give this relief to enforce the discontinuance of the county's racially

discriminatory practices," id. at 232-33. But this Court went further to describe the broad affirmative, remedial authority of the trial courts in desegregation cases:

> The injunction against paying tuition grants and giving tax credits while public schools remain closed is appropriate and necessary since those grants and tax credits have been essential parts of the county's program, successful thus far, to deprive petitioners of the same advantages of a public school education enjoyed by children in every other part of Virginia. For the same reasons the District Court may, if necessary to prevent further racial discrimination, require the Supervisors to exercise the power that is theirs to levy taxes to raise funds adequate to reopen, operate, and maintain without racial discrimination a public school system in Prince Edward County like that operated in other counties in Virginia.

(Id. at 233 [footnote omitted and emphasis added].) The district court had stated it would consider (but had not yet issued) an order to accomplish the reopening of the schools. This Court remanded with instructions to enter the sort of decree it had described:

> An order of this kind is within the court's power if required to assure these petitioners that their constitutional rights will no longer be denied them. The time for mere "deliberate speed" has run out, and that phrase can no longer justify denying these Prince Edward County school children their constitutional rights to an education equal to that afforded by the public schools in other parts of Virginia.
>
> . . . [T]he cause is remanded to the District Court with directions to enter a decree which will guarantee that these petitioners will get the kind of education that is given in the State's public schools. And, if it becomes necessary to add new parties to accomplish this end, the District Court is free to do so.

(Id. at 233-34 [emphasis added].)[36]

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[36]Because the Court remanded with instructions to enter such a decree, Petitioners err fundamentally in trying to discount the importance of the Court's opinion because "the Court did not itself order a tax levy increase" (Clark Pet. at 18; see Jackson County Pet. at 10) or "no tax was actually before the Court in Griffin" (State Pet. at 24). The direction to add parties, if required, unquestionably refers to the County Board of Supervisors, and the necessity of joining them as parties quite evidently refers to the task of assuring funding adequate to "guarantee" that black students in the county would receive "the kind of education that is given in the state's public schools" "without racial discrimination."

(continued...)

The trial court here has faithfully applied the precepts of Griffin. It first considered and approved a remedy adequate to assure the operation of the KCMSD schools without racial discrimination. It carefully determined what resources would be required to implement that remedy and allocated the costs between the joint tortfeasors, the State of Missouri and KCMSD. It required the KCMSD to attempt through every means at its disposal to raise its share of the necessary funding, including by seeking voter approval for additional tax levies on four occasions in 1986 and 1987.[37] To meet KCMSD's fiscal obligations in the early stages of plan

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[36](...continued)

As is evident from the passages quoted in the text, Missouri also is wrong in suggesting that the Court's discussion in Griffin "was limited to a single conclusory statement" (id.).

[37]See 672 F. Supp. at 411, Pet. App. 85a-86a (summarizing attempts by KCMSD to raise funds as well as failure of Missouri legislature to provide new mechanism for this purpose); Pet. App. 127a (suggesting General Assembly of Missouri take such action).

implementation, the court suspended the operation of a state-law property tax rollback provision on two occasions, effectively raising property tax levies within the KCMSD higher than they would have been except for its order.[38] Only after all of these avenues were exhausted and it was clear that absent additional relief from the court the plan could not be fully effectuated, did the district court determine to order an increase in KCMSD's property tax levy. The court's orders require a total levy rate less than the highest rate that had been

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[38]Significantly, the State of Missouri did not appeal the first order, see 807 F.2d at 682-86 (addressing State's arguments on appeal), or seek review in this Court, even after the Court of Appeals in 1986 suggested that the district court could raise the tax levy if necessary to fund the increased share of desegregation costs which it was placing on the KCMSD, see id. at 686, citing Liddell v. Missouri, 731 F.2d at 1319-23. When the rollback was enjoined for the second time, "[t]he State urge[d] that KCMSD be required to pay its share of desegregation costs; it t[ook] no position as to the method through which KCMSD obtains the funds to meet its burden," August 25, 1986 Order at 1.

Neither of the other Petitioners sought intervention on a timely basis following these tax rollback suspensions.

in effect in the KCMSD in the period from 1974 to 1982[39] and provided that the additional levy shall continue only until 1991-92, or until bonds to finance necessary capital improvements have been retired.[40]

It is suggested that Griffin does not support this action because this Court's opinion did not explicitly refer to an increased tax rate (Clark Pet. at 18; Jackson County Pet. at 10). Griffin will not bear such a crabbed reading. This Court could not have intended to deny the district court authority to require the Board of Supervisors to levy and collect a tax "adequate to reopen, operate, and maintain without racial

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[39]See 855 F.2d at 1312, Pet. App. 32a.

[40]672 F. Supp. at 413, Pet. App. 89a; Pet. App. 63a. In view of its reversal of the income tax surcharge, the Court of Appeals directed that the district court reevaluate the need for continuation of the increased property tax levy at the end of the 1991-92 school year, 855 F.2d at 1315, Pet. App. 38a.

discrimination a public school system in Prince Edward County like that operated in other counties in Virginia," 377 U.S. at 233 (emphasis added). The remand directions necessarily meant not only that the district court could require the Board of Supervisors to levy some tax, however small, but that the district court could order it to levy a tax adequate to provide "a public school system in Prince Edward County like that operated in other counties in Virginia."[41] Similarly, if the county's school facilities had fallen into disrepair during the period of their closure and needed to be

[41]Indeed, on remand, the Board of Supervisors initially declined to appropriate any funds, and the district court ordered it to make available "such 'County funds as are reasonably necessary for the opening and maintenance of the public schools * * * on a non-discriminatory basis.'" Plaintiffs then challenged the adequacy of the appropriation; the court entertained this inquiry but "postponed action until subsequent experience should reveal its adequacy or inadequacy." See Griffin v. Board of Supervisors of Prince Edward County, 339 F.2d 486, 489, 490 (4th Cir. 1964)(describing lower court proceedings).

rehabilitated in order to be "reopen[ed]" and made "like [other school facilities] operated in other counties in Virginia," we are confident that the Griffin remand directions encompassed the district court's authority to require adequate funding to accomplish these ends.

The actions of the trial court in the instant matter fall squarely within the ruling in Griffin and Petitioners have advanced no compelling reason why Griffin should be reconsidered; thus, denial of the writ is appropriate.[42]

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[42]We also agree with the Court of Appeals (855 F.2d at 1311-13, Pet. App. 31a-36a) that the district court's actions may be characterized and sustained as directing the disregard of the state law limitation on KCMSD's tax levy rate in order to accomplish vindication of Fourteenth Amendment rights, North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43 (1971); see Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 694-96, modified on other grounds sub nom. Washington v. United States, 444 U.S. 816 (1979).

B. Apart from Griffin, the power of federal courts, in appropriate circumstances, to order state tax levies to be made is not in doubt.

Petitioners, in reliance upon a congeries of decisions from this Court, vehemently contend that federal courts may never direct state or local officials to levy or collect a tax,[43] or may do so only if there is explicit state legislative authorization.[44] This argument rests upon a

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[43] E.g., State Pet. at 22 ("There are serious grounds for doubting that federal courts have any power to order specific taxes"); Clark Pet. at 22 (opinion below "is devoid of any . . . support [for] the premise that the federal judiciary is expressly empowered under Article III to impose taxes to generate revenues to fund court-ordered remedies"); Jackson County Pet. at 11-12 ("A court has many powers, up to but not including the power to order increases in taxation, which may be used to remedy segregation").

[44] E.g., State Pet. at 24 n.31 ("cases allo[w] the use of mandamus to order collection of authorized taxes"). The State's argument on this score appears to rest upon language which it attributes to this Court in United States ex rel. Ranger v. New Orleans, 98 U.S. 381 (1879). Id. However, the language quoted in the Petition is taken from the argument of counsel in that case, which was rejected by this Court; the decision in fact announces the contrary proposition.

In that case the City of New Orleans argued that because the 1854 statute authorizing the city to issue bonds included no explicit provision for a tax levy to pay the principal amounts, judgments in (continued...)

fundamental misreading of the jurisprudence in municipal bond default cases decided by this Court during the last century,[45] and is based upon language in the opinions in some of those cases that is uprooted

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[44](...continued)
favor of the bondholders for those amounts could not be enforced by issuance of a mandamus to levy a tax in order to pay the judgments. 98 U.S. at 390-91. This Court held that authorization of the borrowing "implies and carries with it the power to adopt the ordinary means employed by such bodies to raise funds for their execution, unless such funds are otherwise provided. And the ordinary means in such cases is taxation." Id. at 393. The Court reversed "with directions to issue the writ [of mandamus] as prayed in the petition of the relator," id. at 397.

In United States ex rel. Wolff v. New Orleans, 103 U.S. 358 (1881), this Court applied the same principle, directing the issuance of a writ to levy taxes without regard to a state statute limiting the total annual levy which could be made.

[45]Some of Petitioners' citations are flatly wrong. See supra note 44. Others have nothing to do with the questions at issue here. For instance, Stansbury v. United States, 75 U.S. 33 (1869), cited in State Pet. at 25 n.31, holds that the Secretary of the Interior could not create an obligation binding upon the United States in the absence of legislative authorization. Imbler v. Pachtman, 424 U.S. 409 (1976), cited in State Pet. at 23, recognized an immunity from suit under 42 U.S.C. § 1983 as a matter of statutory construction, not judicial power.

from its context and consequently given an incorrect interpretation.

In the case at bar, the district court on September 15, 1987 entered an order increasing the property tax levy for the KCMSD to $4.00 per $100 of assessed valuation (672 F. Supp. at 413, Pet. App. 90a). Subsequently, the court granted injunctive relief requiring Jackson County officials to collect the additional tax.[46] This was the modern-day equivalent of issuing a writ of mandamus to the local officials requiring them to levy and collect the additional tax.[47] The authority of federal

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[46]On September 29, 1987, the district court issued a Temporary Restraining Order to this effect. Following a hearing, the court continued the order in the form of a preliminary injunction issued October 17, 1987 and made it permanent on January 7, 1988 (Jackson County Pet. App. 111; see 855 F.2d at 1315, State Pet. App. 39a).

[47]The writ of mandamus in the district courts was abolished in 1937 when law and equity jurisdiction was merged and the Federal Rules of Civil Procedure adopted. Fed. R. Civ. P. 81(b). Relief in the nature of mandamus, however, continues to be available and (continued...)

courts to grant this relief has never been doubted.

In Rees v. City of Watertown, 86 U.S. 107 (1874) and Meriwether v. Garrett, 102 U.S. 472 (1880), upon which Petitioners rely so heavily, this Court reiterated its view that writs of mandamus could be issued against state officers requiring them to levy and collect taxes in order to satisfy federal court judgments against them. See Rees, 86 U.S. at 117 ("The appropriate remedy of the plaintiff was, and is, a writ of mandamus); Meriwether, 102 U.S. at 520 ("The taxes levied pursuant to writs of mandamus issued by the circuit court are still to be collected, the agency only for their collection being

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[47](...continued)
"[t]he principles that governed the former writ now govern attempts to secure similar relief," Sanchez-Espinoza v. Reagan, 770 F.2d 202, 207 n.7 (D.C. Cir. 1985)(Scalia, J.). See, e.g., Couch v. City of Villa Rica, 203 F. supp. 897 (N.D. Ga. 1962)(ordering city to increase rates charged by municipally owned utility to satisfy federal court negligence judgment).

changed. The Receiver appointed by the Governor has taken the place of the collecting officers of the city. . . . The Receiver, and any other agent of the State for the collection, can be compelled by the court, equally as the former collecting officers of the city, to proceed with the collection of such taxes").[48]

What this Court refused to approve in Rees and Meriwether, and what it described as being beyond the power of the federal judiciary, was not an order requiring state officials to levy and collect a tax, but rather the designation of the United States Marshal to seize taxable property of private citizens and sell it to satisfy a judgment, see Rees, 86 U.S. at 119, or the

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[48]Graham v. Folsom, 200 U.S. 248, 249 (1906) followed Meriwether in upholding "the judgment of the circuit court in mandamus, requiring [successor public officials following a governmental restructuring] to assess and collect taxes to pay a judgment."

direct appointment of a federal receiver to collect all state taxes and pay the judgment, see Meriwether, 102 U.S. at 508.[49] That is not what was ordered below.

The other decisions to which Petitioners advert are equally distinguishable.[50] It is true that in suits founded

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[49]With characteristic brevity, Justice Holmes in Yost v. Dallas County, 236 U.S. 50, 57 (1915) summarized the operative principle as follows: "Of course it does not follow from the fact that a court has authority to issue a writ of mandamus to compel officers to perform their duty that it can perform that duty in their place."

[50]In Louisiana v. Jumel, 107 U.S. 711 (1883) the Court held that the Eleventh Amendment barred issuance of mandamus against the State -- not a municipality, cf. County of Lincoln v. Luning, 133 U.S. 529 (1890) -- in a suit that was not grounded upon the Fourteenth Amendment, see Milliken II, 433 U.S. at 288-90; cf. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

In Heine v. Levee Commissioners, 86 U.S. 655, 659-61 (1874), in addition to following Rees, the Court held that mandamus relief was unavailable until a federal court judgment had been obtained, to which relief the writ would be ancillary. This principle continues to govern the federal court award of relief in the nature of mandamus today. E.g., Brittingham v. Commissioner, 451 F.2d 315, 317 (5th Cir. 1971); Haggard v. Tennessee, 421 F.2d 1384, 1386 (6th Cir. 1970).

See also supra note 45.

solely upon state law claims, the availability of mandamus relief is subject to pre-existing state law limitations upon officials' taxing authority.[51] However, even in such state-law cases, federal courts will issue mandamus without regard to limitations on remedies adopted after a contract is formed, since these impair the obligation of contract in violation of the federal Constitution.[52] And where federal rights are at stake, as here, of course state-law limitations on remedy must give way. North Carolina State Bd. of Educ. v. Swann, 402

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[51]E.g., Clay County v. United States ex rel. McAleer, 115 U.S. 616 (1885)(contract claim); Louisiana ex rel. Ranger v. New Orleans, 102 U.S. 203 (1880)(contract claim; requirement that judgment be registered); United States v. County Court, 99 U.S. 582 (1879)(contract claim); United States v. County Court, 95 U.S. 769 (1878)(same); Couch v. City of Villa Rica, 203 F. Supp. at 901 (tort suit).

[52]E.g., Louisiana ex rel. Hubert v. Mayor of New Orleans, 215 U.S. 170 (1909); United States ex rel. Hoffman v. Quincy, 71 U.S. 535 (1867). Compare Louisiana ex rel. Ranger v. New Orleans, supra note 51 (subsequent requirement that judgment be registered held not to impair obligation of contract).

U.S. 43 (1971); Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. at 694-96.[53]

We do not quarrel with the proposition advanced by Petitioners that federal courts should make every effort to avoid the necessity of ordering a tax increase. The district court in this action stayed its hand for as long as possible, until there was no other alternative to assure actual implementation of the remedy. See supra, text at nn. 37-38. When that unfortunate circumstance occurred as a result of the defendants' refusals to act, the court was fully justified in fashioning an appropriate decree.

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[53]See Yost v. Dallas County, 236 U.S. at 56, where Justice Holmes characterized the municipal bond cases as involving "obligation[s] under, not paramount to, the authority of the state," the United States Constitution in those suits "only requiring that the obligation of the contract should not be impaired by subsequent state law."

E.g., Hutto v. Finney, 437 U.S. at 687-88 & n.9. The writ should be denied.[54]

Conclusion

For the foregoing reasons, the writs should be denied.

Respectfully submitted,

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[54]We join with and adopt KCMSD Respondents' views as to the undesirability of granting review of the intervention questions raised in Nos. 88-1194 and -1228.